

AMENDED IN ASSEMBLY MARCH 24, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2098

Introduced by Assembly Member Levine

February 20, 2014

An act to amend Section ~~190.3~~ of the Penal Code, relating to the ~~death penalty~~, 1170.9 of, and to add Section 1170.91 to, the Penal Code, relating to sentencing.

LEGISLATIVE COUNSEL'S DIGEST

AB 2098, as amended, Levine. ~~Death penalty~~: Military personnel: veterans: sentencing: mitigating circumstances.

Existing law requires the court, in the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, to make a determination, prior to sentencing, as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service. If the court concludes that the defendant is one of the persons described above, and if the defendant is otherwise eligible for probation and the court places the defendant on probation, the court is authorized to order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that period which the defendant would have served in state prison or county jail, provided

the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists.

This bill would additionally require the court to consider its conclusion that a defendant eligible for probation was, or currently is, a member of the United States military and that the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service as a factor in favor of granting probation.

Existing law provides that specified felonies are punishable by imprisonment in a county jail for 16 months, or 2 or 3 years or, where the term is specified, for the term described in the underlying offense. When a judgment of imprisonment is to be imposed and the statute specifies 3 possible terms, the choice of the appropriate term rests within the sound discretion of the court.

This bill would require the court, if it concludes that a defendant convicted of a felony offense is, or was, a member of the United States military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, to consider those circumstances as a factor in mitigation when imposing a term pursuant to the above provisions.

~~Existing law, as added by the Briggs Initiative, a measure approved by the voters at the November 7, 1978, statewide general election, among other things, provides that persons convicted of first degree murder are subject to death or life in prison without the possibility of parole if any specified special circumstance is found to be true. Existing law also provides that in determining the penalty, the trier of fact is required to take into account certain mitigating and aggravating factors, if relevant, including, but not limited to, the presence or absence of any prior felony conviction, and whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.~~

~~This bill would add whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service, as a mitigating factor.~~

~~The California Constitution authorizes the Legislature to amend or repeal an initiative statute by another statute that becomes effective when approved by the electors.~~

~~This bill would provide that its provisions will become effective only upon approval of the voters, and would provide for the submission of this measure to the voters for approval at a statewide election.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~-no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 1170.9 of the Penal Code is amended to*
2 *read:*

3 1170.9. (a) In the case of any person convicted of a criminal
4 offense who could otherwise be sentenced to county jail or state
5 prison and who alleges that he or she committed the offense as a
6 result of sexual trauma, traumatic brain injury, post-traumatic stress
7 disorder, substance abuse, or mental health problems stemming
8 from service in the United States military, the court shall, prior to
9 sentencing, make a determination as to whether the defendant was,
10 or currently is, a member of the United States military and whether
11 the defendant may be suffering from sexual trauma, traumatic
12 brain injury, post-traumatic stress disorder, substance abuse, or
13 mental health problems as a result of his or her service. The court
14 may request, through existing resources, an assessment to aid in
15 that determination.

16 (b) (1) If the court concludes that a defendant convicted of a
17 criminal offense is a person described in subdivision (a), and if
18 the defendant is otherwise eligible for ~~probation and the court~~
19 ~~places the defendant on probation, the court may order the~~
20 ~~defendant into a local, state, federal, or private nonprofit treatment~~
21 ~~program for a period not to exceed that which the defendant would~~
22 ~~have served in state prison or county jail, provided the defendant~~
23 ~~agrees to participate in the program and the court determines that~~
24 ~~an appropriate treatment program exists. probation, the court shall~~
25 ~~consider the circumstances described in subdivision (a) as a factor~~
26 ~~in favor of granting probation.~~

27 (2) *If the court places the defendant on probation, the court*
28 *may order the defendant into a local, state, federal, or private*
29 *nonprofit treatment program for a period not to exceed that period*
30 *which the defendant would have served in state prison or county*
31 *jail, provided the defendant agrees to participate in the program*

1 *and the court determines that an appropriate treatment program*
2 *exists.*

3 (c) If a referral is made to the county mental health authority,
4 the county shall be obligated to provide mental health treatment
5 services only to the extent that resources are available for that
6 purpose, as described in paragraph (5) of subdivision (b) of Section
7 5600.3 of the Welfare and Institutions Code. If mental health
8 treatment services are ordered by the court, the county mental
9 health agency shall coordinate appropriate referral of the defendant
10 to the county veterans service officer, as described in paragraph
11 (5) of subdivision (b) of Section 5600.3 of the Welfare and
12 Institutions Code. The county mental health agency shall not be
13 responsible for providing services outside its traditional scope of
14 services. An order shall be made referring a defendant to a county
15 mental health agency only if that agency has agreed to accept
16 responsibility for the treatment of the defendant.

17 (d) When determining the “needs of the defendant,” for purposes
18 of Section 1202.7, the court shall consider the fact that the
19 defendant is a person described in subdivision (a) in assessing
20 whether the defendant should be placed on probation and ordered
21 into a federal or community-based treatment service program with
22 a demonstrated history of specializing in the treatment of mental
23 health problems, including substance abuse, post-traumatic stress
24 disorder, traumatic brain injury, military sexual trauma, and other
25 related mental health problems.

26 (e) A defendant granted probation under this section and
27 committed to a residential treatment program shall earn sentence
28 credits for the actual time the defendant serves in residential
29 treatment.

30 (f) The court, in making an order under this section to commit
31 a defendant to an established treatment program, shall give
32 preference to a treatment program that has a history of successfully
33 treating veterans who suffer from sexual trauma, traumatic brain
34 injury, post-traumatic stress disorder, substance abuse, or mental
35 health problems as a result of that service, including, but not limited
36 to, programs operated by the United States Department of Defense
37 or the United States ~~Veterans Administration~~ *Department of*
38 *Veterans Affairs.*

39 (g) The court and the assigned treatment program may
40 collaborate with the Department of Veterans Affairs and the United

1 ~~States Veterans Administration~~ *Department of Veterans Affairs* to
2 maximize benefits and services provided to the veteran.

3 (h) (1) It is in the interests of justice to restore a defendant who
4 acquired a criminal record due to a mental health disorder
5 stemming from service in the United States military to the
6 community of law abiding citizens. The restorative provisions of
7 this subdivision shall apply to cases in which a trial court or a court
8 monitoring the defendant's performance of probation pursuant to
9 this section finds at a public hearing, held after not less than 15
10 days' notice to the prosecution, the defense, and any victim of the
11 offense, that all of the following describe the defendant:

12 (A) He or she was granted probation and was at the time that
13 probation was granted a person described in subdivision (a).

14 (B) He or she is in substantial compliance with the conditions
15 of that probation.

16 (C) He or she has successfully participated in court-ordered
17 treatment and services to address the sexual trauma, traumatic
18 brain injury, post-traumatic stress disorder, substance abuse, or
19 mental health problems stemming from military service.

20 (D) He or she does not represent a danger to the health and
21 safety of others.

22 (E) He or she has demonstrated significant benefit from
23 court-ordered education, treatment, or rehabilitation to clearly
24 show that granting restorative relief pursuant to this subdivision
25 would be in the interests of justice.

26 (2) When determining whether granting restorative relief
27 pursuant to this subdivision is in the interests of justice, the court
28 may consider, among other factors, all of the following:

29 (A) The defendant's completion and degree of participation in
30 education, treatment, and rehabilitation as ordered by the court.

31 (B) The defendant's progress in formal education.

32 (C) The defendant's development of career potential.

33 (D) The defendant's leadership and personal responsibility
34 efforts.

35 (E) The defendant's contribution of service in support of the
36 community.

37 (3) If the court finds that a case satisfies each of the requirements
38 described in paragraph (1), then the court may take any of the
39 following actions by a written order setting forth the reasons for
40 so doing:

1 (A) Deem all conditions of probation to be satisfied, including
2 fines, fees, assessment, and programs, and terminate probation
3 prior to the expiration of the term of probation. This subparagraph
4 does not apply to any court-ordered victim restitution.

5 (B) Reduce an eligible felony to a misdemeanor pursuant to
6 subdivision (b) of Section 17.

7 (C) Grant relief in accordance with Section 1203.4.

8 (4) Notwithstanding anything to the contrary in Section 1203.4,
9 a dismissal of the action pursuant to this subdivision has the
10 following effect:

11 (A) Except as otherwise provided in this paragraph, a dismissal
12 of the action pursuant to this subdivision releases the defendant
13 from all penalties and disabilities resulting from the offense of
14 which the defendant has been convicted in the dismissed action.

15 (B) A dismissal pursuant to this subdivision does not apply to
16 any of the following:

17 (i) A conviction pursuant to subdivision (c) of Section 42002.1
18 of the Vehicle Code.

19 (ii) A felony conviction pursuant to subdivision (d) of Section
20 261.5.

21 (iii) A conviction pursuant to subdivision (c) of Section 286.

22 (iv) A conviction pursuant to Section 288.

23 (v) A conviction pursuant to subdivision (c) of Section 288a.

24 (vi) A conviction pursuant to Section 288.5.

25 (vii) A conviction pursuant to subdivision (j) of Section 289.

26 (viii) The requirement to register pursuant to Section 290.

27 (C) The defendant is not obligated to disclose the arrest on the
28 dismissed action, the dismissed action, or the conviction that was
29 set aside when information concerning prior arrests or convictions
30 is requested to be given under oath, affirmation, or otherwise. The
31 defendant may indicate that he or she has not been arrested when
32 his or her only arrest concerns the dismissed action, except when
33 the defendant is required to disclose the arrest, the conviction that
34 was set aside, and the dismissed action in response to any direct
35 question contained in any questionnaire or application for any law
36 enforcement position.

37 (D) A dismissal pursuant to this subdivision may, in the
38 discretion of the court, order the sealing of police records of the
39 arrest and court records of the dismissed action, thereafter viewable
40 by the public only in accordance with a court order.

1 (E) The dismissal of the action pursuant to this subdivision shall
2 be a bar to any future action based on the conduct charged in the
3 dismissed action.

4 (F) In any subsequent prosecution for any other offense, a
5 conviction that was set aside in the dismissed action may be
6 pleaded and proved as a prior conviction and shall have the same
7 effect as if the dismissal pursuant to this subdivision had not been
8 granted.

9 (G) A conviction that was set aside in the dismissed action may
10 be considered a conviction for the purpose of administratively
11 revoking or suspending or otherwise limiting the defendant's
12 driving privilege on the ground of two or more convictions.

13 (H) The defendant's DNA sample and profile in the DNA data
14 bank shall not be removed by a dismissal pursuant to this
15 subdivision.

16 (I) Dismissal of an accusation, information, or conviction
17 pursuant to this section does not authorize a defendant to own,
18 possess, or have in his or her custody or control any firearm or
19 prevent his or her conviction pursuant to Chapter 2 (commencing
20 with Section 29800) of Division 9 of Title 4 of Part 6.

21 *SEC. 2. Section 1170.91 is added to the Penal Code, to read:*

22 *1170.91. If the court concludes that a defendant convicted of*
23 *a felony offense is, or was, a member of the United States military*
24 *who may be suffering from sexual trauma, traumatic brain injury,*
25 *post-traumatic stress disorder, substance abuse, or mental health*
26 *problems as a result of his or her military service, the court shall*
27 *consider the circumstance as a factor in mitigation when imposing*
28 *a term under subdivision (b) of Section 1170.*

29 ~~SECTION 1. Section 190.3 of the Penal Code is amended to~~
30 ~~read:~~

31 ~~190.3. If the defendant has been found guilty of murder in the~~
32 ~~first degree, and a special circumstance has been charged and found~~
33 ~~to be true, or if the defendant may be subject to the death penalty~~
34 ~~after having been found guilty of violating subdivision (a) of~~
35 ~~Section 1672 of the Military and Veterans Code or Sections 37,~~
36 ~~128, 219, or 4500 of this code, the trier of fact shall determine~~
37 ~~whether the penalty shall be death or confinement in state prison~~
38 ~~for a term of life without the possibility of parole. In the~~
39 ~~proceedings on the question of penalty, evidence may be presented~~
40 ~~by both the people and the defendant as to any matter relevant to~~

1 ~~aggravation, mitigation, and sentence, including, but not limited~~
2 ~~to, the nature and circumstances of the present offense, any prior~~
3 ~~felony conviction or convictions whether or not that conviction or~~
4 ~~those convictions involved a crime of violence, the presence or~~
5 ~~absence of other criminal activity by the defendant that involved~~
6 ~~the use or attempted use of force or violence or that involved the~~
7 ~~express or implied threat to use force or violence, and the~~
8 ~~defendant's character, background, history, mental condition, and~~
9 ~~physical condition.~~

10 ~~However, evidence shall not be admitted regarding other criminal~~
11 ~~activity by the defendant that did not involve the use or attempted~~
12 ~~use of force or violence or that did not involve the express or~~
13 ~~implied threat to use force or violence. As used in this section,~~
14 ~~criminal activity does not require a conviction.~~

15 ~~However, in no event shall evidence of prior criminal activity~~
16 ~~be admitted for an offense for which the defendant was prosecuted~~
17 ~~and acquitted. The restriction on the use of this evidence is intended~~
18 ~~to apply only to proceedings pursuant to this section and is not~~
19 ~~intended to affect statutory or decisional law allowing that evidence~~
20 ~~to be used in any other proceedings.~~

21 ~~Except for evidence in proof of the offense or special~~
22 ~~circumstances that subject a defendant to the death penalty,~~
23 ~~evidence shall not be presented by the prosecution in aggravation~~
24 ~~unless notice of the evidence to be introduced has been given to~~
25 ~~the defendant within a reasonable period of time as determined by~~
26 ~~the court, prior to trial. Evidence may be introduced without that~~
27 ~~notice in rebuttal to evidence introduced by the defendant in~~
28 ~~mitigation.~~

29 ~~The trier of fact shall be instructed that a sentence of confinement~~
30 ~~to state prison for a term of life without the possibility of parole~~
31 ~~may in future after sentence is imposed, be commuted or modified~~
32 ~~to a sentence that includes the possibility of parole by the Governor~~
33 ~~of the State of California.~~

34 ~~In determining the penalty, the trier of fact shall take into account~~
35 ~~any of the following factors if relevant:~~

36 ~~(a) The circumstances of the crime of which the defendant was~~
37 ~~convicted in the present proceeding and the existence of any special~~
38 ~~circumstances found to be true pursuant to Section 190.1.~~

1 ~~(b) The presence or absence of criminal activity by the defendant~~
2 ~~that involved the use or attempted use of force or violence or the~~
3 ~~express or implied threat to use force or violence.~~

4 ~~(c) The presence or absence of any prior felony conviction.~~

5 ~~(d) Whether or not the offense was committed while the~~
6 ~~defendant was under the influence of extreme mental or emotional~~
7 ~~disturbance.~~

8 ~~(e) Whether or not the victim was a participant in the defendant's~~
9 ~~homicidal conduct or consented to the homicidal act.~~

10 ~~(f) Whether or not the offense was committed under~~
11 ~~circumstances that the defendant reasonably believed to be a moral~~
12 ~~justification or extenuation for his or her conduct.~~

13 ~~(g) Whether or not defendant acted under extreme duress or~~
14 ~~under the substantial domination of another person.~~

15 ~~(h) Whether or not at the time of the offense the capacity of the~~
16 ~~defendant to appreciate the criminality of his or her conduct or to~~
17 ~~conform his or her conduct to the requirements of law was impaired~~
18 ~~as a result of mental disease or defect, or the affects of intoxication.~~

19 ~~(i) The age of the defendant at the time of the crime.~~

20 ~~(j) Whether or not the defendant was an accomplice to the~~
21 ~~offense and his or her participation in the commission of the~~
22 ~~offense was relatively minor.~~

23 ~~(k) Whether the defendant was, or currently is, a member of the~~
24 ~~United States military and whether the defendant may be suffering~~
25 ~~from sexual trauma, traumatic brain injury, post-traumatic stress~~
26 ~~disorder, substance abuse, or mental health problems as a result~~
27 ~~of that service.~~

28 ~~(l) Any other circumstance that extenuates the gravity of the~~
29 ~~crime even though it is not a legal excuse for the crime.~~

30 ~~After having heard and received all of the evidence, and after~~
31 ~~having heard and considered the arguments of counsel, the trier~~
32 ~~of fact shall consider, take into account, and be guided by the~~
33 ~~aggravating and mitigating circumstances referred to in this section,~~
34 ~~and shall impose a sentence of death if the trier of fact concludes~~
35 ~~that the aggravating circumstances outweigh the mitigating~~
36 ~~circumstances. If the trier of fact determines that the mitigating~~
37 ~~circumstances outweigh the aggravating circumstances the trier~~
38 ~~of fact shall impose a sentence of confinement in state prison for~~
39 ~~a term of life without the possibility of parole.~~

1 ~~SEC. 2. Section 1 of this act amends the Briggs Initiative of 1978,~~
2 ~~Proposition 7, an initiative statute, and shall become effective only~~
3 ~~when submitted to and approved by the voters. The Secretary of~~
4 ~~State shall submit Section 1 of this act for approval by the voters~~
5 ~~at a statewide election in accordance with Section 9040 of the~~
6 ~~Elections Code.~~

O